

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 194 OF 2007
WITH
CIVIL APPLICATION NO.414 OF 2007

Shri Dinkar Sakharam Patwardhan. ..Appellant.

V/s.

Shri Suresh Vishnu Patwardhan & Ors. ..Respondents.

Mr.G.V.Limaye & Mr.M.B.Kale for appellant.

Mr.Shishir Joshi for respondent Nos. 3,4A to 4C, 6 & 7.

CORAM: A.M.KHANWILKAR, J

DATE : JULY 9, 2007.

P.C. :

1. Heard counsel for the parties.

2. The only argument canvassed before this Court is in the context of ground No.26 in the appeal memo, which read thus :

"26) Exh.133, Mutation entry No.2282 based on partition when interpreted leads to following legal and logical inferences.

A) The family was separated as per oral intimation given on 1-5-94 disrupting the co-parcenery.

OR

B) Suresh the plaintiff was exclusively given- Survey No.59/2 admeasuring 65 gunthas of land alongwith an enclosure of 9 graft

trees; so he having separated could not file a suit for - partition his remedy being to file a suit for re-opening of partition by adding all the properties and all the co-parceners.

OR

C) The plaintiff ought to have included survey No.59/2 in the suit and brought it in the hotch potch of properties in the suit. A substantial question arises whether the suit is tenable on any of the legal inferences A, B, or C above based on legal interpretation of the basis document Exh.133 showing mutation entry No.2282."

3. After having considered argument, however, clauses (A) and (B) aforestated will have to be turned down on the reasoning that the Courts below have analysed the evidence on record and have concurrently found as of fact that Exh. 133 does not indicate that the respective shares in the properties were given to Manohar and Yeshwant.

4. The next argument of the appellant is that from Exh. 133, it is more than clear that Survey No.59/2, which was joint family property has not brought within the common hotch potch of the family properties. The appellant would be entitled for relief with regard to the suit property. This argument however, cannot be countenanced for want of

specific case made out by the appellant in that behalf, either in the pleadings or during the evidence adduced before the Court below. No such contention was raised before the trial Court or for that matter the appellate Court. The argument is essentially based on the issues of facts, which have remained to be asserted on behalf of the appellant before the lower Court. No foundation in that behalf has been laid during the trial.

5. I am in agreement with the argument canvassed on behalf of the respondents that before lower Court the contest on behalf of the defendant was in respect of properties bearing Survey Nos. 11/4, 31/3, 37/2 and 58/5 only. No grievance whatsoever, was made in respect of property bearing Survey No. 59/2.

6. To get over this position, the counsel for the appellant would contend that this Court in exercise of powers under section 103 of the Civil Procedure Code, may consider those facts, though not determined by the lower Courts. Even this argument does not commend to me.

7. In the first place, the fact that Survey No.59/2 is joint family property was required to be

asserted by the plaintiff and that position established during the trial. Even on liberal reading of section 103 of the Code, in my opinion, the Court would determine new issue necessary for disposal of the appeal, though not considered by the lower Courts, only if there is sufficient evidence on record in that behalf. This Court cannot consider the argument of the appellant, as there is neither pleadings nor evidence on record in that behalf. Thus understood, this appeal should fail.

7. The same is dismissed.

8. In view of the above order, nothing survives for consideration in the civil application. Accordingly, the same is disposed of.

(A.M.KHANWILKAR, J)